IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF	)	NO. 44478-0-II
	)	RESPONSE TO
	)	PERSONAL RESTRAINT
CHARLES DAVIS	)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Davis is currently in the custody of the Washington Department of Corrections, serving an indeterminate sentence of 136 months to life following his conviction for one count of first degree rape. Exhibit A to Petition at 1, 5.

II. STATEMENT OF PROCEEDINGS

Davis appealed his conviction, which was affirmed by Division I of the Court of Appeals in an unpublished opinion filed on July 5, 2011. A copy of that opinion is attached to this response as Appendix

A.[1] The substantive facts of the case are summarized at pages1-10.

Davis now brings a timely personal restraint petition (PRP).

III. RESPONSE TO ISSUES RAISED

1. Davis fails to rebut the presumption that a decision not to call a witness is a reasonable trial tactic and cannot form the basis of a claim of ineffective assistance of counsel.

Davis offers the declaration of Jenny Anderson, Exhibit C to his petition. The same declaration was presented to the trial court as an offer of proof; the trial court ruled it inadmissible but left the door open for reconsideration if Davis presented evidence that the crime charged was connected in some way to prostitution. See Appendix B, copy of the Findings of Fact and Conclusions of Law entered by the court following the evidentiary hearing. Davis, not surprisingly, testified at trial that he had paid the victim $25 for sex. See Exhibit H to Davis's petition. He claims ineffective assistance of counsel because his trial counsel did not renew the motion to present Anderson's testimony.

On direct appeal, Davis claimed ineffective assistance of counsel on several grounds, none of them that counsel failed to

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1 The Supreme Court denied review at State v. Davis, 173 Wn.2d 1007, 268 P.3d 941 (2012).

renew the motion to present Anderson's testimony. Appendix A at 20-21. He now offers a supplemental declaration of Anderson which is merely cumulative of the testimony she offered in her original declaration. Exhibit D to petition.

A PRP is not an appeal. The burdens imposed on a petitioner in a PRP are significant. Because of the significant societal costs of collateral litigation often brought years after a conviction and the need for finality, relief will only be granted in a PRP if there is constitutional error that caused substantial actual prejudice or if a nonconstitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. In re Pers. Restraint of Woods, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). It is the petitioner's burden to establish this "threshold requirement." Id. To do so, a PRP must present competent evidence in support of its claims. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885-886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992).

After establishing the appropriateness of collateral review, a petitioner still has the ultimate burden of proof. The petitioner must show the existence of an error, and must show by a preponderance of

the evidence that he or she was prejudiced by the asserted error. In re Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990). If the petitioner fails to meet this burden, he is not entitled to relief.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that

counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel,

but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Generally, a decision not to call a witness is a trial strategy that will not support an ineffective assistance of counsel claim. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004)..

Trial counsel for Davis did not inadvertently overlook renewing the motion. After both sides rested and the jury instructions were approved, counsel told the court:

> Your Honor, just one housekeeping matter. The defense or myself did indicate at the beginning of the trial that Judge Tabor's previous ruling regarding the testimony of Jenny Anderson will be revisited. I have rested my case. I have not asked this Court to revisit that ruling and I'm not planning on doing so.

Appendix C, page 302 of the trial transcript. The logical inference is that counsel made a tactical decision not to renew the motion. A reviewing court does not second guess tactical judgments. State v. Lord, 117 Wn.2d 829, 885, 822 P.2d 177 (1991).

Davis asserts that there can be no strategic reason for failing to

bring the motion back before the court.[2] While counsel did not make a record of his reason for abandoning the motion to offer Anderson's testimony, several possibilities come to mind. He may have discovered something about Anderson that affected her credibility. From Anderson's declaration alone one can tell that if she truly did observe the victim acting as she claims, then Anderson herself must be a prostitute. There would be no reason for her to be frequently in the company of a girl offering sexual services to unknown men if she herself were not engaged in the same behavior. Counsel may well have considered that the victim presented more sympathetically than Anderson would, and her testimony could backfire. There was testimony that the story Davis gave on the witness stand was different from the story he told Detective Reinhold when he was arrested. See Appendix D, a portion of Reinhold's testimony, and Appendix E, a transcript of Davis's entire testimony. If counsel felt the jury was not particularly swayed by Davis's testimony, he might well have chosen not to emphasize the prostitution claim. The victim was sixteen years

2 For purposes of this argument the State will assume, without conceding, that the testimony would have been admissible.

old at the time. Calling her a prostitute might not have seemed like the best idea, particularly if Anderson were impeachable.

Further, Davis has not demonstrated any prejudice from counsel's decision. The outcome of the trial could possibly have been different only if the jury believed Anderson and gave greater weight to her testimony than that of the victim. He has not shown a reasonable probability that Anderson's testimony would have affected the outcome of the trial.

A reviewing court begins with the strong presumption that trial counsel provided effective assistance. The decision not to call Anderson as a witness was clearly a tactical one, which cannot form the basis of a claim if ineffective assistance of counsel. Things happen during a trial that may change the planned strategy; there is no requirement that counsel make a record of his reasons for a change of tactics. Davis has failed to carry his burden of establishing either substandard performance by his attorney or prejudice resulting from that performance.

> 2. A judge does not close a courtroom by asking one spectator to give up her seat so that the jury panel may be seated together for voir dire. There was no courtroom closure and no violation of Davis's right to a public trial.

The State does not dispute that a defendant is entitled to a trial in a courtroom open to the public, or that if the courtroom were closed during certain portions of the proceedings, the remedy would be reversal and a new trial. Here, however, Davis claims only that one spectator was asked to give up her seat so that the jury venire could be seated together for voir dire. See Exhibit I to petition. In his declaration, Davis asserts that the spectator failed to move until spoken to by a bailiff and that she then left the courtroom. He speculates, but presents no credible evidence, that the bailiff asked the young woman to leave. Exhibit J to petition.

The right of a defendant to a public trial is preserved by both the Sixth Amendment to the United States Constitution and article I, section 10 of the Washington Constitution. Whether that right has been violated is a question of law that an appellate court reviews de novo. State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011). The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and

a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

The factors the court must consider are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
>
> 4. The court must weigh the competing interests of the proponent of the closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d at 258-59.

That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92, citing to Bone-Club, 128 Wn.2d at 257, or when jurors are questioned in chambers. Lormor, 172 Wn.2d at 92, citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009).

In Lormor, the court excluded from the courtroom the four year old daughter of the defendant. The child was terminally ill, confined to a wheelchair, and needed a ventilator to breathe. Lormor, 172 Wn.2d at 87. The court found that the noise of the ventilator would potentially distract the jury and that the courtroom setting could limit her ability to express her needs. Id. at 88-89. Lormor appealed on the grounds the court had impermissibly closed the courtroom.

Both the Court of Appeals and the Supreme Court affirmed. The latter court found:

> Lormor's trial was conducted in an open courtroom. No showing is made that public attendance during the trial, or at any other stage, was prohibited. While it is unclear from the record whether there were any other observers in the courtroom, what is clear is that only one person was excluded, and there was no general prohibition for spectators or any other exclusion of the public.

Lormor, 172 Wn.2d at 92-93. The court further distinguished Lormor's situation from that in several other cases. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the entire family of the defendant was excluded from the courtroom during voir dire. In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), all spectators were excluded. In State v. Easterling, 157 Wn.2d 167, 137

P.3d 825 (2006), all spectators as well as the codefendant and his counsel were excluded from the courtroom. In State v. Momah, 167 wn.2d 140, 217 P.3d 321 (2009) and State v. Strode, 167 W.2d 222, 217 P.3d 310 (2009), part of the jury selection process occurred in the judge's chambers out of sight of the public. Lormor, 172 Wn.2d at 92-93. The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Id. at 93.

The situation is Davis's trial does not even rise to the level of the exclusion in Lormor. Davis presents no evidence that the one spectator was asked to leave, only that she was asked to give up her seat for the jury panel. As in Lormor, there is no evidence about other spectators in the courtroom; Davis asserts that he had asked various groups to attend and observe his trial, but he does not indicate whether any of them did. He believed she was one of those he invited, but he has nothing to support that belief.

In any event, the court asked the spectator to do nothing more than move. No one was excluded from the courtroom. If the

spectator chose to leave, that was her decision, not something required by the court. The judge could not hold her in the courtroom against her will. In sum, Davis has simply failed to establish any courtroom closure at all, and thus no violation of his right to a public trial.

IV. CONCLUSION

In a PRP, the petitioner bears the burden of establishing both a constitutional error and prejudice resulting from it. Davis has done neither. The State respectfully asks this court to deny and dismiss his petition.

RESPECTFULLY SUBMITTED this 15th day of May, 2013.

JON TUNHEIM
Prosecuting Attorney

Carol La Verne

CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX A

*2011 Wash. App. LEXIS 1515, **

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES JEFFREY DAVIS, *Appellant*.

No. 66938-9-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2011 Wash. App. LEXIS 1515

June 2, 2011, Oral Argument
July 5, 2011, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at State v. Davis, 2011 Wash. App. LEXIS 1573 (Wash. Ct. App., July 5, 2011)

PRIOR HISTORY: [*1]
Appeal from Thurston Superior Court. Docket No: 09-1-00963-9. Judgment or order under review. Date filed: 05/06/2010. Judge signing: Honorable Paula K Casey.

DISPOSITION: Affirmed.

CORE TERMS: rape, sex, boyfriend, transit, consensual, restroom, sexual conduct, shield, profile, raped, sexual behavior, sexual intercourse, defense counsel, ineffective, credibility, admit, vaginal, act of prostitution, ineffective assistance of counsel, personal knowledge, right to present, investigator, intercourse, prostituted, admissible, sexual, matched, minutes, semen, girl

COUNSEL: *Patricia Anne Pethick*, Attorney at Law, Tacoma, WA, for Appellant(s).

John C. Skinder, Thurston County Prosecutors Office, Olympia, WA, for Respondent(s).

JUDGES: AUTHOR: Michael S. Spearman, J. WE CONCUR: Anne Ellington, J., Mary Kay Becker, J.

OPINION BY: Michael S. Spearman

OPINION

¶1 SPEARMAN ▾, J. — Charles Davis was convicted by a jury of rape in the first degree for the 2001 rape of K.C. In 2009, the DNA profile developed from semen in K.C.'s rape kit was matched to Davis. Davis told police that the two had consensual sex and sought to introduce evidence from K.C.'s former friend about K.C. apparently engaging in prostitution around the time of the alleged rape. On appeal, he claims that (1) the trial court erred in refusing to admit the sexual conduct evidence, (2) the evidence was insufficient to support the jury's verdict, and (3) he received ineffective assistance of counsel. We hold that Davis failed to preserve his claim as to the sexual conduct evidence, but that even if the issue was properly preserved, the trial court did not abuse its discretion. **[*2]** We also hold that the evidence at trial supported the verdict and that Davis did not receive ineffective assistance of counsel based on the record before us. We affirm.

FACTS

¶2 On Sunday, September 23, 2001, K.C., a 16-year-old girl, was dropped off at the Lacey transit center by her mother. K.C. told her mother she was going to see a friend, but she was actually planning to see her much-older boyfriend, of whom her mother did not approve. At the transit center, K.C. saw a group of six or seven young men wearing blue clothing, blue bandanas, and gold jewelry, and approached them to ask where to find bus schedules. The young men told her to shut up, then pushed her into the men's restroom. K.C. testified that her arms and legs were held down and she was raped vaginally by one or possibly two of the men. She was scared because she did not know if they were armed. The men then left the restroom. K.C. was bleeding from her vagina. She stayed in the restroom for about five minutes, then cleaned up and left. A security guard was sitting in his parked vehicle near the men's restroom, reading a newspaper, but K.C. did not report the rape. She first went to see her boyfriend and later went home. **[*3]** K.C. told her boyfriend about the rape but the two of them decided not to call the police. She did not tell her parents.

¶3 While K.C. was at school the next day, she was in pain, so she reported the rape to school authorities. She was taken to St. Peter's Hospital, where an examination and rape kit were performed by Dr. Joseph Pellicer and a sexual assault nurse examiner. While it was standard practice for a nurse examiner to conduct the exam, Pellicer was also involved because a "procedural sedation" had to be performed due to K.C.'s pain and discomfort. Pellicer observed a vaginal laceration that extended "from the vaginal fourchette approximately 8 to 10 millimeters into the floor of the vagina." He testified that, based on his training and experience, this type of injury was not consistent with consensual sexual intercourse. [1] K.C. had no bruises or cuts on any other part of her body. The nurse examiner described K.C.'s demeanor as "quite scared, anxious, very uncomfortable." K.C. was contacted at the hospital by Detective Beverly Reinhold, who described her as very distraught. A DNA profile was developed from semen samples taken from the rape kit but no profile match was found at **[*4]** that time.

FOOTNOTES

1 He testified, "If a woman is resisting intercourse, it's the type of injury that you see. The muscles are very tight and the skin around the vagina tears."

¶4 Approximately eight years later, in April 2009, the DNA profile developed in K.C.'s case was matched to the DNA profile of Charles Davis. [2] Detective Reinhold learned that the day after K.C. was assaulted Davis had pawned a gold bracelet in Olympia. After locating Davis, Reinhold advised him of his Miranda [3] warnings and informed him that she was investigating a 2001 sexual assault at the Lacey transit center. Davis agreed to talk, though not to be recorded, and told Reinhold that, years ago, he had had consensual sex with a girl in the men's restroom at the transit center. He said that the two had just met and talked about having sex, one of them suggested going to the bathroom, they had sex for less than two minutes, and then the girl got

on a bus and left. Davis commented that Reinhold should just check the videotape to see what happened. Reinhold informed him there was no video recording at the time.

FOOTNOTES

2 William Dean, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that he located semen **[*5]** in the biological samples taken from K.C.'s rape kit. He testified that the genetic profile from that semen was matched, in April 2009, to an individual and that he then requested the police to obtain a reference sample from that individual to perform additional testing. The police obtained a sample from that individual, Charles Davis, and additional testing confirmed that the genetic profiles matched to a very high degree of scientific certainty. The DNA hit arose after Davis was arrested on a felony drug charge in 2008 and underwent a DNA test pursuant to that conviction, although this evidence was not presented to the jury.

3 *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L.E.2d 694 (1966).

¶5 Davis was charged by amended information with one count of rape in the first degree or, in the alternative, rape in the second degree. Before trial he filed a motion to admit evidence of K.C.'s past sexual behavior to support his consent defense, pursuant to the rape shield statute, RCW 9A.44.020. The offer of proof in support of the motion was the Declaration of Jenny Anderson, in which Anderson stated that she believed K.C. prostituted herself in 2001. [4] Judge Gary Tabor denied Davis's **[*6]** motion, entering findings of fact and conclusions of law. He ruled that the evidence was not admissible because (1) at that time there was no evidence indicating that Davis and K.C. had sex as an act of prostitution and therefore the evidence was not relevant to the facts, (2) Anderson's opinion was outside of her personal knowledge, (3) the prejudicial effect of the evidence outweighed its probative value, and (4) the exclusion of the evidence would not result in a denial of justice to Davis. He indicated that his ruling was based on the posture of the case at that time, and that he might re-hear the matter if circumstances changed.

FOOTNOTES

4 Anderson's declaration stated:

> In October of 2001, when I was fourteen or fifteen, I ran away from home with [K.C.]. Both of us went to the "Hilltop" area of Tacoma, WA and stayed, for the most part, with [K.C.'s] boyfriend, Curtis. . . . He lived with another man named Darryl. I was there less than a month before I called a social services agency because I wanted to come home. Shortly after I returned home, the police found [K.C.] in the Hilltop area and returned her to her family.
>
> [K.C.] was involved in a sexual relationship with Curtis at this time. I **[*7]** know this from living in close proximity to them in Tacoma. In particular, I overheard them having sex on more than one occasion at the residence. She further abused alcohol and drugs with him — in particular, crack cocaine. This, I personally observed. While in Tacoma, I did not use illegal drugs, but I did drink alcohol.
>
> Certain facts persuade me that [K.C.] prostituted herself when we both lived in Tacoma, though I can't say this for certain. I recall several times when [K.C.], in public, would walk up to cars, speak with the occupants, and then climb inside and leave the area in the company of the people she had spoken with. I was not close enough to these interactions to overhear any specific conversations, but it did not appear to me that [K.C.] knew the occupants of

these cars before leaving with them. I also recall that [K.C.'s] choice of clothing made me think she was working as a prostitute, and that she frequently had money to spend, though she didn't have a job. The source of this money, to the best of my knowledge, was her boyfriend, Curtis. This last fact, along with the large difference in age between [K.C.] and her boyfriend, further makes me think that Curtis may have **[*8]** been acting as [K.C.'s] pimp during the time [K.C.] and I stayed in Tacoma.

I recall one incident at a 7-11, in Tacoma, in particular. [K.C.] and I were there to use the phone, to arrange for Curtis to pick us up. It was late at night. While we were there, [K.C.] approached a car that had pulled into the parking lot and began talking with the car's occupants — at least two men. After a short conversation, [K.C.] got into the car with these men and left the area. I did not see her again until the next morning, back at Curtis' house. Later, [K.C.] asked me to lie about this incident and to tell Curtis, if he asked, that the men in the car had raped her. I believe she asked me to say this because she was worried that Curtis would be upset if he learned that she had gone with the men willingly.

[K.C.], in fact, asked me to "cover" for her with Curtis on more than one occasion. Most of these requests from [K.C.] concerned her behavior involving men besides Curtis. I believe she did not want Curtis to know that she was spending time with other men besides him when we both lived in Tacoma.

When we were in Tacoma, [K.C.] never mentioned being raped in September of 2001, in Lacey. I did not learn **[*9]** of this incident until I was contacted by Paula Howell, a private investigator retained by Mr. Kaufman to investigate his case, in 2009. Given her behavior as I recall it in 2001, I don't believe that [K.C.] was raped at that time. Instead, I believe that [K.C.] lied to police investigators so that Curtis would not know she had willingly had sex with another man.

¶6 Judge Paula Casey presided over the jury trial. The State filed a motion in limine regarding the previous ruling by Judge Tabor. The prosecution and defense counsel agreed it would not be proper for the defense to present evidence from Jenny Anderson without first making a motion to reopen the issue, as required by Judge Tabor's ruling. Judge Casey agreed. The defense did not seek to offer Anderson's testimony at trial.

¶7 Davis testified in his own defense. He denied raping K.C. He testified that he was alone at the transit center on September 23, 2001 when he was approached by K.C. Davis wore a lot of jewelry and K.C. told him that she liked his jewelry. The two talked for 15 to 20 minutes. The topic of sex came up, and K.C. indicated that she was a prostitute. She agreed to have sex with him in exchange for $25, and the two **[*10]** also agreed that Davis would buy $40 worth of crack cocaine from K.C.'s boyfriend and split it with her. They observed security guards in the area, so they decided that he would first go into the men's restroom and she would follow. They had sex for about two minutes, after which they got on a bus and met K.C.'s boyfriend at the Olympia transit center. Davis did not like K.C.'s boyfriend and decided to leave without buying drugs. He acknowledged pawning a bracelet the next day.

¶8 The jury found Davis guilty of rape in the first degree. He was sentenced to a standard-range sentence of 136 months to life.

DISCUSSION

¶9 Davis first argues that the trial court erred in denying his motion to admit evidence of K.C.'s prior sexual conduct. Second, he argues that the evidence was insufficient to support the jury's verdict. Finally, he claims ineffective assistance of counsel. We find no merit in Davis's claims and affirm.

Evidence of K.C.'s Prior Sexual Conduct

¶10 Under the rape shield statute, evidence of the victim's past sexual behavior is admissible on the issue of consent only if: (1) it is relevant; (2) its probative value substantially outweighs the probability that its admission will create a substantial **[*11]** danger of undue prejudice; and (3) its exclusion will result in denial of substantial justice to the defendant. *State v. Hudlow*, 99 Wn.2d 1, 16-17, 659 P.2d 514 (1983) (applying former RCW 9.79.150(3) (1979), now recodified as RCW 9A.44.020(3)). The admissibility of past sexual behavior evidence is within the sound discretion of the trial court. *Id.* at 17 (citing *State v. Blum*, 17 Wn. App. 37, 46, 561 P.2d 226 (1977)).

¶11 Davis argues that the trial court violated his Sixth Amendment right under the United States Constitution to present evidence to support his consent defense. He argues that the Anderson evidence was admissible under the rape shield statute, RCW 9A.44.020, [5] and that it was relevant because it showed a pattern of sexual conduct. He cites *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010) for the proposition that even if the rape shield statute applies, it could not be used to deprive him of his right to present a defense. He contends that the error was not harmless beyond a reasonable doubt.

FOOTNOTES

5 RCW 9A.44.020, the rape shield statute, provides in pertinent part:

> . . .
>
> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, **[*12]** divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section . . . .

The purpose of the statute was to prevent the misuse of prior sexual conduct evidence so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. *Hudlow*, 99 Wn.2d at 8. Evidence of prior sexual conduct cannot be used to attack the victim's credibility. But "[f]actual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual" would cause the evidence to be relevant under ER 401. *Id.* at 11.

¶12 The State argues that Davis failed to preserve the issue for appeal because he did not attempt to introduce the evidence at trial. It points out that at the pretrial hearing, Judge Tabor indicated that the issue could be raised again.

¶13 We agree with the State and hold that Davis did not properly preserve the issue for appeal. We note, moreover, that even if the issue was preserved, the trial court did not abuse its discretion **[*13]** in ruling that the evidence was not admissible based on where the case stood at the time. For appeals arising from a trial court's rulings on motions in limine, a waiver of the right to raise the issue on appeal depends on whether the trial court made a final ruling. *See State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). If it did, "the losing party is

deemed to have a standing objection . . . '[u]nless the trial court indicates that further objections at trial are required when making its ruling.'" *Id.* (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984)) (alteration in original). But when the ruling is tentative, "'any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.'" *Powell*, 126 Wn.2d at 257 (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)).

¶14 Here, Judge Tabor made a pretrial ruling based on the defense's offer of proof, stating that "my ruling today is based on the posture of the case before me at this time." He noted that there was presently no evidence that Davis and K.C. had sex as an act of prostitution, so any evidence that K.C. might have prostituted herself **[*14]** on another occasion was not relevant. He also noted that the issue could be brought back should circumstances change. When Davis testified at trial that the sex with K.C. was a consensual act of prostitution, this was arguably a change in circumstances that would warrant reconsideration of his motion. But Davis did not offer Anderson's testimony or ask the trial court to reconsider the issue. Therefore, he failed to preserve the issue for appeal.

¶15 We note that even if the issue was preserved, the trial court did not abuse its discretion. While defendants have "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." [6] *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (citing *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009)). Here, the record reflects that at the time of the pretrial hearing, there was no evidence that K.C. had sex with Davis as an act of prostitution. The trial court observed that defense counsel appeared to have decided upon this as a matter of strategy that counsel would discuss with Davis as the case moved forward. Absent evidence regarding prostitution, the trial court properly **[*15]** ruled that Anderson's testimony was not relevant. Furthermore, another basis for the court's ruling was Anderson's lack of personal knowledge under ER 602. [7] This was also a proper basis to exclude the evidence. Anderson's declaration stated, "I can't say [K.C. prostituted herself] for certain." Her opinion was based on K.C.'s approaching strangers and leaving with them, wearing certain clothing, and having money to spend.

FOOTNOTES

6 Davis relies on *Jones* to argue that the rape shield statute cannot be used to deprive him of the right to present a defense, but *Jones* is inapposite. There, the trial court ruled that the rape shield statute prohibited the defendant in a rape trial from testifying about his version of events on the night of the alleged rape. 168 Wn.2d at 717-20. The Washington Supreme Court held that the trial court's refusal to allow this testimony violated the defendant's Sixth Amendment right to present a defense. *Id.* at 719-20. Here, Davis was not prevented from testifying as to his version of what happened between K.C. and himself. The evidence he sought to introduce related to what K.C. did on other occasions.

7 Under ER 602, "A witness may not testify to a matter unless evidence **[*16]** is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

Sufficiency of the Evidence

¶16 To prove that Davis committed rape in the first degree, the State was required to prove beyond a reasonable doubt:

> (1) That on or about September 23, 2001, the defendant engaged in sexual intercourse with [K.C.];

(2) That the sexual intercourse was by forcible compulsion;

(3) That the defendant

(a) inflicted serious physical injury, or

(b) kidnapped [K.C.]; and

(4) That any of these acts occurred in the State of Washington

¶17 On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). **[*17]** All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *Id.* "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 740 P.2d 335, (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citing *State v. Longuskie*, 59 Wn. App. 838, 801 P.2d 1004 (1990)).

¶18 Davis contends that K.C.'s testimony demonstrated that her claim of rape by forcible compulsion was suspect and argues that the State failed to establish proof beyond a reasonable doubt. He points out that K.C. admitted lying to her mother about taking the bus to see a friend rather than her boyfriend. Furthermore, although K.C. testified to struggling while being attacked, there were no cuts, **[*18]** scratches, or bruises on her body the next day. Davis also points out that he readily told police eight years later that he had consensual sexual intercourse with a girl at the transit center.

¶19 The State contends there was evidence that K.C. was raped, pointing to K.C.'s testimony and Dr. Pellicer's testimony that K.C.'s vaginal tear was consistent with non-consensual intercourse. The State points out that K.C. testified that she did not report the rape immediately because she did not feel people would believe her. It also points out that Davis testified in his own defense and that there was conflicting evidence about his version of events at trial versus what he told Detective Reinhold when she interviewed him in 2009. It argues that the jury was permitted to accept or reject Davis's testimony.

¶20 We agree with the State. The evidence was undisputed that Davis had vaginal intercourse with K.C. The case turned on the conflicting testimony of K.C. and Davis as to whether such sex was consensual. K.C. testified that she was dragged into the restroom, that her arms and legs were held down, and that she was raped vaginally. She testified that she was in serious pain the next day. Dr. Pellicer **[*19]** testified that the vaginal tear she suffered was similar to the type of injury suffered by women giving birth and was consistent with non-consensual intercourse. This evidence was sufficient for a jury to find Davis guilty of rape in the first degree. The jury was entitled to weigh the evidence and make credibility determinations.

Ineffective Assistance of Counsel

¶21 Claims of ineffective assistance are mixed questions of fact and law that we review de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to establish either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, he must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Only legitimate trial strategy constitutes reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Second, he must show that the deficient performance was prejudicial. *Hendrickson*, 129 Wn.2d at 78. Prejudice occurs **[*20]** when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'" *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 694). There is a strong presumption of effective representation of counsel, and the defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct. *State v McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

¶22 Davis claims in his Statement of Additional Grounds that he received ineffective assistance under the Sixth Amendment because defense counsel: (1) failed to prepare the case so that the defense investigator could testify; (2) failed to call certain transit employees as witnesses; (3) failed to contact the Gang Unit Task Force to determine that Davis had never been in a gang; (4) failed to call an expert witness, such as a rape trauma expert or physician, to rebut Dr. Pellicer's testimony that the only way K.C. would have sustained her injury would have been through non-consensual sexual intercourse; (5) refused to comply with Davis's request to present a motion for an interlocutory appeal of the rape-shield issue; [8] and (6) did **[*21]** not adequately consult with Davis. He contends that collectively, these deficiencies amounted to a failure to adequately prepare a defense and prejudiced his trial. He contends that his version of events was supported only by his own testimony, and that the outcome would have differed had the jury heard corroborating testimony.

FOOTNOTES

[8] He contends that two months after Judge Tabor ruled on the admissibility of the evidence, the Washington Supreme Court issued its ruling in *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

¶23 Davis's first claim relates to the defense's attempt to present the testimony of investigator Paula Howell, who interviewed K.C. on January 5, 2010. Howell was prepared to testify about inconsistencies between K.C.'s statements to police in 2001 and her statements to Howell, but soon after she took the stand, the trial court ruled that she could not continue because defense counsel had not asked K.C. on cross-examination about the issues he sought to rebut with Howell's testimony. Davis argues that counsel was ineffective in not preparing ahead of time so that Howell could testify. This claim fails because Davis cannot establish prejudice by the failure to admit Howell's **[*22]** testimony. The only inconsistencies in K.C.'s statements that are pointed out by Davis have to do with the position of her arms when she was raped and the number of stalls in the restroom. Even if Howell had testified about these inconsistencies, Davis cannot show that the result of the trial would have been different.

¶24 Davis's remaining claims involve matters outside the record. It is not possible, for example, to verify on the record what transit employees would have testified or to examine the communications between Davis and defense counsel. This court does not, on direct appeal, consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). A defendant alleging ineffective assistance of counsel must show

deficient representation based on the record below. *Id.* Davis fails to do so.

¶25 Affirmed.

BECKER and ELLINGTON, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 09-1-963-9
STATE OF WASHINGTON, Plaintiff, vs. CHARLES JEFFREY DAVIS, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** RE: Evidentiary Hearing/ Rape Shield Law **EX PARTE**

THIS Court heard an evidentiary hearing in the above-entitled case on February 8, 2010. Present before the Court were the above-named Defendant, Thurston County Deputy Prosecuting Attorney John C. Skinder, and the attorney for the defendant David Kauffman. The Court, having reviewed the briefing of the parties, the offer of proof, the declaration and having heard the arguments of counsel, issued the following attached ruling which is incorporated herein by reference.

DATED this 22nd day of MARCH 2010.

THE HONORABLE GARY TABOR

Presented by:

John C. Skinder, WSBA #26224
Deputy Prosecuting Attorney

Approved for Entry:

David Kauffman, WSBA#36946
Attorney for Defendant

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	SUPERIOR COURT NO. 09-1-00963-9
vs.	)	
	)	
CHARLES JEFFREY DAVIS,	)	
	)	
Defendant.	)	

THE HONORABLE GARY R. TABOR PRESIDING, DEPARTMENT 5

Evidentiary hearing ruling
Verbatim report of proceedings
February 8, 2010
2000 Lakeridge Drive SW, Building 2
Olympia, Washington

Ralph H. Beswick, Official Court Reporter
Certificate No. 2023
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Office of Assigned Counsel
1520 Irving Street
Tumwater, WA 98512

****

THE COURT: Counsel, here's the way I see the matter here today. RCW 9A.44.020, the so-called Rape Shield statute, is based upon a public policy that encourages people to come forward and report situations that are otherwise very private and certainly embarrassing to have to talk about. And one of the side issues of a person talking about a sexual assault is other aspects of their sexual behavior or allegations of sexual behavior. In this particular case I am told that an incident took place at a bus station in the city of Olympia and that it was reported as a violent rape, that there was evidence gained by police in the investigation of injury to the victim that was consistent with a violent sexual act and that this case has languished for many years based upon no DNA match, but following the defendant's arrest on another matter, his DNA proved to be the same as that present in samples taken from the alleged victim in this case, that the defendant gave a statement indicating that he had only vague recollection of this situation, but believed that he did have sex with an individual who he believed to be 18 or so. Evidence is that this victim was 16 at the time I believe. In any event, he believed that he did have sexual contact with an individual and that it was

consensual.

Subsequent to that the investigation of the defense has put them in contact with a young lady who has given an affidavit. Her name is Jennie Anderson. She acknowledges that she ran away from home to the Hilltop area in Tacoma and that the alleged victim in this case was with her. This situation took place about a month after the alleged rape had taken place. Miss Anderson then in an affidavit details certain occurrences that she indicates that she observed which gave her pause for some suspicion that the alleged victim in this case may have been engaging in prostitution. She also indicates that the alleged victim in this case had a sexual relationship with a boyfriend who was considerably older than her. I've also been given information by the state that this boyfriend was the father of two children with the alleged victim subsequently.

So I'm called upon to look to see whether the Rape Shield prohibition in this case should be overcome by the evidence presented. Subsection (3)(d) of that statute indicates that such other sexual behavior would be admissible if several conditions are met: First, that it's relevant to the issue of the victim's consent, that its probative value substantially outweighs any prejudice, and that exclusion of the evidence would

result in the denial of substantial justice to the defendant.

I guess there is one other issue that I should at least mention, and I did hear testimony -- I'm sorry. I did hear argument that there was an allegation by the alleged victim in this case of rape by another group of men and that that was never reported to law enforcement. The affiant that I've spoken of earlier, Miss Anderson, indicates that she was told that this was what she should tell the boyfriend if he ever questioned where the alleged victim was at that time.

Weighing the facts in each of these cases, I'll indicate first of all that there is no affidavit that would indicate that an act of prostitution was the basis for any consent in the present case. Mr. Kauffman has candidly told me that that's a matter of tactic that he's going to have to discuss with his client as this case unfolds. He suggests that absent such a affidavit or statement by the defendant in this case this court can still consider the impact of such information on the issue of relevance. He concedes that it would be less relevant, but apparently maintains that it would nevertheless be relevant .

I'm finding first of all that I find no relevance to the facts in the present case, and that is the issue of

consent in the posture of the case at the present time, there being no allegation that prostitution was involved. I'll further indicate that were that not the case, had an act of prostitution in the current matter been alleged, I would still have to weigh the value, or the relevance I guess I should say, of having sex with others as acts of prostitution in Tacoma at a future time, approximately a month or so later. As to that, I'll indicate that while Miss Anderson has expressed her opinion, that is a subjective opinion, and that opinion is outside her personal knowledge, and for those reasons would not be a sufficient basis for my finding relevance, even in a case that there was an allegation that a rape took place in the charged situation here in the city of Olympia.

Secondly, as to the probative value versus the prejudicial effect, it is clear that the actions of a 16-year-old girl running away and prostituting herself, if believed by the jury, would be very prejudicial. Whether or not there's probative value, one might ask, is it a common thing for victims of sexual abuse to act out and to often act out in sexual ways? I don't have any expert testimony one way or the other in this case, but it seems to this court that the prejudicial effect would far outweigh any probative value as to whether or

not there was consent in this particular case.

Finally, I do not find that exclusion of this information would result in the substantial denial of justice, or the denial of substantial justice, however that should be phrased, in light of the subjective nature of Miss Anderson's testimony. For those reasons I'm denying the defense motion to allow this testimony to be presented to a trier of fact. Absent more information -- I'm not fishing for more information, but I'm indicating that my ruling today is based on the posture of the case before me at this time. If circumstances change, could the matter be brought back? Well, there could at least be an argument that I should consider additional facts if that were the case, but I'm not going to speculate as to whether or not that might or would occur. In any event, based on the information before me today, I am denying the defendant's motion, and this information will not be presented to the jury.

****

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript and that the transcript is a true and complete record of my stenographic notes.

Dated this 12th day of March, 2010.

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,	)	COURT OF APPEALS NO.
	)	40680-2-II
Plaintiff,	)	
	)	
vs.	)	
	)	
CHARLES J. DAVIS,	)	SUPERIOR COURT NO.
	)	09-1-00963-9
Defendant.	)	
	)	VOLUME II - JURY TRIAL

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on March 15, 16, 17, 18, 2010, the above-entitled and numbered cause came on for hearing before JUDGE PAULA CASEY, Thurston County Superior Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter
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Tumwater, WA 98512

I N D E X

Verbatim Report of Proceedings

VOLUME II

Proceedings of March 17, 2010

prepared. I'll see if they can be copied before my assistant goes to lunch and she will leave a copy for you at the front counter, court administration. And just for your information, I'm going to number them in the order that they were provided. The consent instruction becomes No. 15 in the packet. And we'll return at 1:30.

Real quickly, well, there are no exceptions, then, to the instructions we've discussed, but I'll allow for one more time to put exceptions on the record after you see the instructions. We'll proceed with instructions and argument at 1:30.

MR. KAUFFMAN: Your Honor, just one housekeeping matter. The defense or myself did indicate at the beginning of the trial that Judge Tabor's previous ruling regarding the testimony of Jenny Anderson will be revisited. I have rested my case. I have not asked this Court to revisit that ruling, and I'm not planning on doing so.

THE COURT: Good. I think the ruling in light of the evidence presented is still an appropriate ruling. Okay.

So hopefully the instructions will be available to you shortly and you can check at court administration or with Trina directly for them, and we'll reconvene

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 5th day of August, 2010.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,	)	COURT OF APPEALS NO.
	)	40680-2-II
Plaintiff,	)	
	)	
vs.	)	
	)	
CHARLES J. DAVIS,	)	SUPERIOR COURT NO.
	)	09-1-00963-9
Defendant.	)	
	)	VOLUME I - JURY TRIAL

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on March 15, 16, 17, 18, 2010, the above-entitled and numbered cause came on for hearing before JUDGE PAULA CASEY, Thurston County Superior Court, Olympia, Washington.

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I N D E X

Verbatim Report of Proceedings

Trial held March 15, 16, 17 & 18, 2010

Proceedings of March 15, 2010

Proceedings of March 16, 2010

Plaintiff's Case in Chief:

photos and talked a little bit about, because time had gone by and now it will be nine years later, and I wanted to see where she was at. And then I made some efforts to try to locate Mr. Davis by sending out, through some law enforcement channels, information requesting any other agency that would have had contact with him and an address that I might be able to locate him at.

Q. And did you -- where did you locate him geographically?

A. In Tacoma.

Q. And did you go and see him?

A. Yes. Well, he was actually brought to me.

Q. Okay. Is the Mr. Davis that you contacted, is he present in the courtroom today?

A. He is.

Q. Can you identify where he is?

A. He's sitting at the defense table next to Mr. Kauffman.

Q. And did you introduce yourself to him?

A. I did.

Q. Did he know why you were speaking to him to your knowledge?

A. He did.

Q. And did you advise him of what are commonly referred

to as Miranda warnings?
A. Yes, I did.
Q. Do you do that off a card or off memory, or how do you do that?
A. Off of a card.
Q. Do you have that card with you today?
A. I believe so.
Q. Would it be --
A. Uh-huh.
Q. Can you read them, the warnings, can you read them to the jury the way you would have read them to Mr. Davis?
A. "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him or her present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of the rights that I've explained to you?" And they say yes or no. "And then having these rights in mind, do you wish to speak with -- do you wish to speak with me now?"

Q. And did you read them that way to him?
A. Yes.
Q. And did he have any questions about those rights?
A. No.
Q. Did he agree to speak with you?
A. He did.
Q. And did you -- what is your practice regarding tape-recording? We heard earlier testimony about a transcript. What is your procedure regarding tape-recording someone or not recording someone?
A. The state of Washington is two-party consent, and so we have to have the consent of both parties in order to tape-record any conversations, and I asked Mr. Davis if he would consent to a tape-recording of our conversation and he declined that but he agreed to talk to me.
Q. And so did you give him additional information as to what it was that you were going to be talking to him about?
A. I did.
Q. What did you tell him?
A. I told him that I was investigating I believe a sexual assault that occurred at the transit center in 2001.
Q. And what did he tell you?

A. He told me that he was in the -- in the Olympia area at that time.
Q. Did he tell you -- did he tell you anything else regarding the allegations?
A. He did. He told me that he remembered having sex with a female in the men's bathroom at the transit center, but indicated that it was consensual.
Q. Did he indicate whether he knew the victim prior to this?
A. He did not. He said that they had just met, had a -- had a brief conversation and -- and talked about having sex, and then the bathroom was suggested as a place that they do that and they went in the bathroom and had sex for less than two minutes, and then she got on a bus and left.
Q. Did you ask him, -- did you ask him to describe where in the bathroom they had sex, what positions they had sex in?
A. He was not -- didn't have a very clear memory of the circumstances surrounding it as far as, you know, what positions they were in, where in the bathroom that they were at, whether their clothes -- how it was that their clothes came off, and made the comment that, you know, I should just check the videotape, that that would show it. And I told him that there

wasn't a videotape at that time, and then one of his next comments was that then he remembered it was actually by the sink in the bathroom that they had sex, but again, didn't provide a lot of detail about positioning and clothing and that kind of thing.

Q. Did Mr. Davis tell you whether he knew the name of the victim?

A. He did not.

Q. Did he tell you whether there was anyone else in the bathroom at the time?

A. He said that it was just the two of them.

Q. Did he indicate whether he had ever seen her before or after?

A. He said that he had not seen her prior, nor had he seen her after.

Q. Was he able to -- well, let me ask you. Did you ask him to describe the victim to you?

A. I did.

Q. And how did he do that?

A. Can I refresh my memory with my notes?

Q. Certainly.

A. He described her as a little shorter than him with dark hair, he was unsure of her body type, but when I asked how old he thought she was, he thought that she looked over 18.

Q. Did he -- oh, and by the way, during your processing of information on Mr. Davis, did you learn of his date of birth?
A. I did.
Q. What was his date of birth?
A. March 4th, 1963.
Q. So he would have been 31 -- I mean 38 in 2001?
A. I believe that's right.
Q. Did he indicate -- did he give you any other information?
A. The only other information he gave was I asked him where each of them went afterwards. He couldn't remember what he did or where he went, but he knew that she got on a bus, and just shortly before our conversation ended he made a vague mention of them having a conversation about her boyfriend.
Q. And you said that the conversation came to a close then?
A. It did.
Q. And so after that, did you obtain what's been referred to as a reference sample from Mr. Davis?
A. I did.
Q. And how did you obtain a reference sample?
A. Similar to what Mr. Dean had described. It's basically a Q-tip that we swab the inside of the

CERTIFICATE OF REPORTER

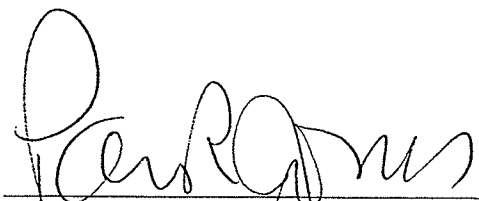
STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 5th day of August, 2010.



PAMELA R. JONES, RMR
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APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,	)	COURT OF APPEALS NO.
	)	40680-2-II
Plaintiff,	)	
	)	
vs.	)	
	)	
CHARLES J. DAVIS,	)	SUPERIOR COURT NO.
	)	09-1-00963-9
Defendant.	)	
	)	VOLUME II - JURY TRIAL

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on March 15, 16, 17, 18, 2010, the above-entitled and numbered cause came on for hearing before JUDGE PAULA CASEY, Thurston County Superior Court, Olympia, Washington.

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Olympia, WA 98502

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I N D E X

Verbatim Report of Proceedings

VOLUME II

Proceedings of March 17, 2010

(The following proceedings were held in open court outside the presence of the jury.)

THE COURT: The defendant may come to the witness stand. I'll swear you under oath when the jury comes in, and why don't you put the microphone straight up to begin with and pull it back when you're ready. Okay.

(The following proceedings were held in open court in the presence of the jury.)

THE COURT: Court's back in session. You may be seated. Although the lawyers are eager to speak to me, I'm going to place the witness under oath first.

CHARLES J. DAVIS a witness herein, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: Okay. So Mr. Kauffman.

BY MR. KAUFFMAN:

Q. Thank you. Good morning, Mr. Davis.

A. Good morning.

Q. May I call you Charles?

A. Sure.

Q. Okay. Are you comfortable?

A. Yes.
Q. Okay. Charles, I want to start by asking you to introduce yourself to the jury and to spell your last name for the benefit of the court record.
A. My name is Charles, middle initial J, last name D-a-v-i-s, Davis.
Q. Now, Charles, are you originally from the Olympia area?
A. No. I'm originally from Wisconsin.
Q. Now, when did you travel to this part of country?
A. I moved here in 1993.
Q. And there is a reason you chose to relocate at that time?
A. Yes. My mom is here in Washington and I came to be with her.
Q. Now, Charles, I want to move forward to the events of September 23rd, 2001. Were you living in the Olympia area in 2001?
A. Yes.
Q. Now, do you recall that day in particular?
A. Yes, I do.
Q. Now, Charles, if you could, please, just give the jury a brief description of your activities that day and what it is that you did.
A. Well, I was visiting a friend in Lacey. I had stayed

over at her house that night, and I walked to the Lacey Transit Center from Ruddell Road because the bus had left like every hour and every half-hour from Ruddell Road from Lacey to downtown Olympia, so I walked to the transit center and that's where I met the alleged victim.

Q. Okay. Let's stop there. Was there a particular reason you were planning to go -- where were you planning to go that day?

A. Yeah. I was going downtown to the Labor Ready because I worked at the Labor Ready and I had a routine that I did. From one o'clock I visited the Salvation Army and the Bread & Roses because I stayed in Salvation Army during the weekday and I spent the weekend over at my friend's house in Lacey.

Q. Now, do you recall approximately what time you arrived at the transit center that day?

A. Approximately, say, five to 12:00.

Q. And now, you indicated that you met a person you described as the alleged victim?

A. Yes.

Q. Now, how did you meet this person?

A. Well, I observed the alleged victim, her mother drove up from the Fred Meyer side of the transit center, I guess it's the further back part of the transit

center, and I was smoking because that's where the smoking section is, which I seen the alleged victim get out of the car and she walked down to where you get the bus schedule and I seen her came back. She paced two or three times up and down like she was in a hurry to get on the bus, so she asked me for a cigarette because I was sitting in the back smoking, and I offered her a cigarette and offered her a seat as well.

Q. She asked you for a cigarette?

A. Yes.

Q. And you offered her one?

A. She offered -- she asked and I gave it to her. I gave her a cigarette.

Q. Now, did you strike up a conversation with this person?

A. Yes.

Q. And approximately how long would you say that conversation lasted?

A. The conversation lasted from 15 to 20 minutes.

Q. And what is it that you discussed with her at that time?

A. We discussed basically -- first we introduced ourselves. We discussed her boyfriend, her mom, sex, drugs, my jewelry, because I wore a lot of jewelry at

that time. Basically, that was it.
Q. So some risqué subjects, if you will?
A. Excuse me?
Q. I'm sorry. Some -- what's the word I'm looking for -- some private topics, if you will?
A. Yes, private.
Q. Now, Charles, if you would, if you could take the jury from this conversation that you were having with this person and lead us into what occurred next while you were at the Lacey Transit Center with this person.
A. Okay. Once she sat down and we introduced ourselves, we started talking about where she worked. She said she had a job. I worked two jobs at the time because I'm a workaholic. We talked about that. We talked about her mom. We talked about her mom being overprotective of her. We talked about my jewelry, because I wore a lot of jewelry and she liked the jewelry. We talked about sex, which was a part of her job.
Q. Now let me stop you there, Mr. Davis. You indicate sex was a part of her job?
A. Yes.
Q. What do you mean by that?
A. She was a prostitute.

THE COURT: I'm going to ask the jury be briefly excused.

(The following proceedings were held in open court outside the presence of the jury.)

THE COURT: And I guess there's no hearsay objection to any of this discussion?

MR. SKINDER: Correct. It's the defendant's version of events.

THE COURT: The defendant's story is subject to hearsay as well.

MR. SKINDER: That's true.

THE COURT: But there's no problem. If there's no problem, we'll proceed.

MR. SKINDER: Well --

THE COURT: We'll proceed.

MR. SKINDER: We'll proceed.

(The following proceedings were held in open court in the presence of the jury.)

THE COURT: Court's back in session. Please be seated.

BY MR. KAUFFMAN:

Q. Mr. Davis, you indicated that -- in your conversation you indicated that the conversations with this person, who you've described as the alleged victim, that sex was a part of her job?

A. Yes.
Q. And what did that indicate to you?
A. Rephrase that.
Q. When she indicated that sex was a part of her job, what was your understanding? What did you think that she meant?
A. Oh, I knew what she meant but I just couldn't believe it. This young lady was -- the way she was dressed and everything, she didn't seem to me like she was a prostitute or streetwalker, basically.
Q. Now, did you -- let me move forward briefly. Did you have sex with this person, Mr. Davis?
A. Yes.
Q. And was any agreement made between you and this person with regards to that sexual encounter that you indicated?
A. Yes.
Q. What was the nature of that agreement, Mr. Davis?
A. Well, the agreement was that I gave her $25 and I was -- we was going to buy crack from her boyfriend once we got downtown. I was supposed to by $40 worth of crack from her boyfriend and split it with her because I didn't smoke at the time.
Q. So this is the agreement that was struck between you and this person that you met?

A. Yes.
Q. Now, what happened after this agreement was struck?
A. Well, we decided to -- where we was going to go, where was we going to go to access because at the time I didn't have a place, and evidently she was in an area that she didn't know. So I decided, well, let's go in the men's restroom, you know, and yeah.
Q. And did you do that, Mr. Davis?
A. Yes.
Q. And did she similarly enter the restroom with you?
A. No.
Q. No. Explain, please.
A. Well, we set there and we thought about it because there were two security guards, one in the truck and one walked around. So we came to agreement that I will go in first to make sure that no one was in there, and she would stand by the bus stop, and once the other security guy moved off she would come in.
Q. So she ultimately did follow you into the restroom?
A. Yes.
Q. Now, Mr. Davis, is that where you then had sex with this person?
A. Yes.
Q. And do you recall where in particular in the restroom you were located?

A. Yes. In the one stall. They only have one stall.
Q. Now, Mr. Davis, about how long would you say this sexual interaction with this person continued?
A. Well, it was -- because we both didn't want to be in there, the place too long, so it was only two minutes, about two minutes.
Q. So brief --
A. Yes, brief.
Q. -- to your recollection. Now, Mr. Davis, after this sexual act concluded, what did you do?
A. Well, we got on the bus. I mean, after we left out of there we smoked a cigarette, then we got on the bus.
Q. So the both of you got on the same bus?
A. Yes.
Q. And where was that bus traveling?
A. Towards downtown Olympia.
Q. And where did you get off, Mr. Davis, do you recall?
A. We got off at the Olympia Transit Center. We both --
Q. So the both of you got off at the same place?
A. Yes.
Q. And that was the Olympia Transit Center?
A. Yes.
Q. And where -- you previously -- well, I'll just ask my question. Did you encounter anyone else at that

time?
A. Yes.
Q. And who was that, Mr. Davis?
A. Her boyfriend.
Q. Her boyfriend?
A. Yes.
Q. Now, and is this the same person that you had previously spoken to her about?
A. Yes.
Q. And if you could just briefly describe the nature of the interaction with -- well, let me ask a different question. Did you have any sort of interaction with that person?
A. Yes.
Q. If you would please simply describe the nature of that interaction.
A. Well, I decided not to buy any crack from him, you know, 'cause when I saw him, and I thought about how they -- how he was treating her as far as her smoking crack, I didn't agree with that.
Q. So you elected not to follow through with that aspect of the agreement?
A. Yes.
Q. So was that a lengthy, brief interaction?
A. It was kind of brief.

Q. And after that interaction concluded, Mr. Davis, what then did you do?
A. I went about my business.
Q. So you left the Olympia Transit Center?
A. Yes.
Q. And you were not in the company of another person at that time?
A. No.
Q. Mr. Davis, I want to fast-forward at this time to the middle of last year, June, approximately June 2009. Do you recall what city you were residing in at that time?
A. Yes, Tacoma.
Q. Did you have occasion to come in contact with law enforcement at that time?
A. Yes.
Q. And specific, were you transported into the company of Detective Reinhold?
A. Yes.
Q. Now, Mr. Davis, at the time that you were transported into the custody of Ms. Reinhold, did you understand what it was that Detective Reinhold wanted to speak with you about?
A. At first not exactly.
Q. Did you -- did Detective Reinhold have occasion to

tell you what it is that she wanted to speak with you about?

A. Yes.

Q. Now, fair to say, Mr. Davis, that today here in court on the stand you have stated some things which you did not say to Detective Reinhold when she spoke with you in June of last year; isn't that correct?

A. Exactly.

Q. Mr. Davis, if you could, why is that? Why -- why did you not share these things at that time?

A. Well, one reason is that it was so long ago and I couldn't remember every detail that happened nine years ago from one hour. I tried to be as honest with Mrs. -- with the detective as possible, but at the same time, I didn't want to put myself in jeopardy of saying something that could hurt me or maybe could be misconstrued.

Q. So in essence -- strike that. Now, subsequent to your conversation with Ms. Reinhold, you were arrested, correct?

A. Yes.

Q. Mr. Davis, I just have one last question for you and then Mr. Skinder, I anticipate, will likely have some questions for you, and that is simply to ask you, point blank, did you rape the woman who you now

know --

A. No, no.

Q. -- to be Kristi Caver?

A. No, no.

MR. KAUFFMAN: Mr. Davis, I have no further questions. Thank you.

THE COURT: Mr. Skinder?

CROSS-EXAMINATION

BY MR. SKINDER:

Q. Good morning.

A. Good morning.

Q. Your testimony that you've given this morning was that when you were contacted by Detective Reinhold in 2009 up in Tacoma, you do not remember all the details of this incident, correct?

A. Correct.

Q. And that was in 2009, we're talking seven to eight years after this incident in September of 2001, correct?

A. Correct.

Q. And now we stand eight to nine years past that incident and now you remember more details; isn't that correct?

A. Correct.

Q. And you also acknowledge that you lied to Detective

Reinhold when you spoke to her and you told her some things about what happened on September 23rd, 2001?

A. I don't understand the question.

Q. I'm asking you point blank, isn't it true that you lied to Detective Reinhold about what you said happened on September 23rd, 2001?

A. I still don't understand the question because you've never give me an example of what I'm supposed to lie about.

Q. I'm asking you right now just a specific question. Did you, in fact, lie to Detective Reinhold when you told her about what happened on September 23rd, 2001?

A. No.

Q. So when she asked you to tell you everything she -- that you knew about the incident, you told her everything?

A. No, I couldn't recall everything.

Q. Well, that's what I'm getting at. You said that you did not want to tell her something that would get you in trouble, but you also say that you did not remember?

A. I did not want to give her an answer that I wasn't totally sure about, sir.

Q. So let me just make sure I'm clear. Your testimony is that you were 100 percent honest with the

detective when you spoke to her in Tacoma?
A. I was honest to the extent of what of the knowledge that I had still retained from nine years ago at that time being under the pressure that I was under on being tooken from somewhere.
Q. And that you didn't feel was going to get you in trouble, correct?
A. No, I just wanted to answer the question truthfully.
Q. Well, wasn't your answer that you were worried that what you were -- what you were going to say would be -- going to be misconstrued?
A. Well, maybe I might have said misconstrued. I really don't understand what misconstrued means. What I was trying to say is I just still didn't want to put myself in jeopardy, that's what I'm trying to say, because coming from the environment that I was in and just brought to a police station and saying that an incident occurred nine years ago that I briefly remember, was not going to give you -- was not going to feed into anything that I did not know, that I did not have knowledge of right away at that time.
Q. So I think the testimony, the way you phrased it, was that you tried to be honest when you spoke to her?
A. To the best of my ability to answer her questions, yes.

Q. So today you remember things that you did not remember back when she spoke to you in 2009?
A. Well, I wouldn't say that I didn't remember, I didn't recall.
Q. So you didn't recall those things in 2009?
A. Say that again.
Q. You did not recall those items in 2009?
A. Which items are you referring to?
Q. All the things that you've testified to in court today. Sir, I don't think it's a funny matter.
A. No, I couldn't understand, I didn't think --
Q. Do you understand my question?
A. Not really.
Q. That you've stated things today that you did not state when you met with the detective in June 2009, correct?
A. Correct.
Q. So you recall things today in court that you did not recall in 2009?
A. Correct.
Q. And now, the detective had told you that she was investigating a rape allegation, correct?
A. Correct.
Q. So you knew what the issue was?
A. Yes.

Q. And she advised you of your Miranda warnings, correct?
A. Yes.
Q. And you understood those warnings, correct?
A. Yes.
Q. And she told you, in fact, that this was a rape that occurred at the Lacey Transit Center in 2001, correct?
A. Correct.
Q. Just so I make sure I understand, the testimony that you offer today that you never told the detective about was that you entered into an agreement for money to have sex?
A. Yes.
Q. And again, you knew in 2009 that you were being investigated for rape?
A. You mean, yes, when I was at the Lacey Police Department, yes.
Q. And your testimony is you also made an agreement to buy crack cocaine?
A. Yes.
Q. And that was another thing that you did not recall in 2009 when you spoke to Detective Reinhold, correct?
A. Correct.
Q. Today in court you remember that there were two

security guards. You didn't remember that back in 2009 when you spoke to Detective Reinhold, correct?

A. Correct.

Q. The order of how you and Ms. Caver ended up in the bathroom, that also is new today in court and different than what you provided to the detective in 2009, correct?

A. Correct.

Q. Your testimony in, excuse me, your statement to Detective Reinhold in 2009 was that after what you described as the sexual encounter, the victim, who you do not know her name, she went on a bus by herself, correct?

A. I said she got on the bus. I did not say by herself, I'm not sure. I don't think I said by herself. I said she got on a bus.

Q. Isn't it true you told Detective Reinhold that you're unsure where the victim was going at that time?

A. Correct.

Q. So that, too, is remarkably different from today what you have said in court as to what you said to Detective Reinhold in 2009?

A. Are you asking me a question?

Q. That's a question.

A. Correct.

Q. Now, you described today a conversation of 15 to 20 minutes, correct?
A. Correct.
Q. Where you talked about all sorts of details about each others life, correct?
A. Correct.
Q. In 2009 when you met with Detective Reinhold, you indicated that you didn't even know this person's name, correct?
A. I'm not sure. I'm not sure. I maybe told her that I couldn't remember her name.
Q. Do you remember describing how you thought she looked over 18?
A. Correct.

MR. SKINDER: May I have a moment?

THE COURT: Sure.

MR. SKINDER: Thank you. I just have a couple more questions, Your Honor.

THE COURT: Sure.

BY MR. SKINDER:

Q. Mr. Davis, you heard testimony today from Aris Mitchell that you had pawned a piece of jewelry on September 24th, 2001, at City Pawn; is that correct?
A. That's correct.
Q. And, in fact, you did do that?

A. That's correct.

MR. SKINDER: Thank you. I have no further questions.

THE COURT: Any more questions?

MR. KAUFFMAN: Your Honor, there's some brief redirect.

REDIRECT EXAMINATION

BY MR. KAUFFMAN:

Q. Mr. Davis, in June of 2009, as you know, you previously testified you were transported into the presence of Detective Reinhold, correct?

A. Correct.

Q. You were asked questions about an incident that was said to have occurred back in 2001?

A. Correct.

Q. Is that something -- is that interaction or experience that you had had occasion to think about between 2001 and 2009?

A. No.

MR. KAUFFMAN: Mr. Davis, thank you. I have no further questions.

THE COURT: Any other questions?

MR. SKINDER: No.

THE COURT: So I just want a sidebar before we -- you can just stay right there, Mr. Davis.

THE WITNESS: Yes, ma'am.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: So that concludes the presentation of this case. We're going to go to lunch and we'll be back at 1:30 for instructions and closing argument.

Excuse me. Did you rest, Mr. Kauffman?

MR. KAUFFMAN: Your Honor, yes. The defense rests.

(The following proceedings were held in open court outside the presence of the jury.)

THE COURT: Okay. I'd like to do my instructions on the record and so I'm going to bring the consent instruction to the courtroom so that we can discuss whether that will be given or not given, so I'll be right back, and you can have a seat at counsel table.

(A brief recess was had.)

THE COURT: So yesterday we had a brief discussion about instructions, and in the State's proposed packet it was my understanding there was no objection to any of the instructions. We will remove the instruction about the defendant having no obligation to testify since he has testified, and

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 5th day of August, 2010.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154

THURSTON COUNTY PROSECUTOR

May 15, 2013 - 9:13 AM

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Comments:

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